

October 16, 2006

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Heart of America Northwest

Date of Filing: June 12, 2006

Case Number: TFA-0165

On June 12, 2006, Heart of America Northwest (HANW) filed an appeal from a determination issued to it on June 6, 2006, by the Department of Energy's (DOE) Office of River Protection (ORP). In that determination, ORP responded to a request for documents that HANW submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. ORP identified several documents responsive to HANW's request. Some of those documents were released in their entirety and, pursuant to Exemptions 4 and 5 of the FOIA, others were released with some deletions or withheld in their entirety. HANW challenged the withholding of information under Exemptions 4 and 5. This appeal, if granted, would require ORP to release the withheld information to HANW.

I. Background

HANW requested documents pertaining to the Waste Treatment and Immobilization Plant (WTP) at the DOE's Hanford Site in Richland, Washington. *See* Letter from Erik Olds, ORP, to Hyun Lee, HANW (May 9, 2006) (Determination Letter). ORP identified several documents responsive to HANW's request. Of those documents, several were released in their entirety, including correspondence between the DOE and DOE contractor Bechtel National, Inc. (BNI). The documents released with deletions include the Army Corps of Engineers "Independent Review of WTP Estimate at Completion (EAC) 2005" (ORP report), the Project Estimate at Completion April 2005 prepared by BNI, and other correspondence.

ORP stated that the information withheld under Exemption 4 was provided by BNI and related to "financial strategies which [BNI] was required to submit to DOE." Determination Letter. ORP stated that release of the information was "a source of corporate intelligence about BNI and its plans, capabilities, and commitments for the future. This information could be used by competitors to the disadvantage of BNI and result in impairing the government[s] ability to

obtain this and other necessary information in the future[.]” *Id.* ORP stated that the information withheld under Exemption 5 consisted of advice, recommendations, and other information it believed should remain internal to the DOE as the agency “determines the appropriate contract strategies going forward.” *Id.* ORP added that the information did not reflect a final agency position, but rather was “subject to review and action by DOE officials.” *Id.*

HANW challenged ORP’s withholding of information under Exemptions 4 and 5 on various grounds. Letter from Gerald Pollet, HANW, to OHA (June 9, 2006) (Appeal). HANW’s arguments are discussed below.

II. Analysis

As an initial matter, HANW argues that ORP did not identify which FOIA exemption it was applying to each specific deletion. Under the FOIA, if a request for a record is denied, the denial must include “a statement of the reason for the denial, containing a reference to the specific exemption under the [FOIA] authorizing the withholding of the record and a brief explanation explaining how the exemption applies to the record withheld...” 10 C.F.R. § 1004.7(b)(1). Our review of the documents provided to HANW shows that in several of the documents ORP failed to specify which exemption it claimed for each deletion. Rather, ORP claimed both Exemptions 4 and 5 at the bottom of each page, applying both exemptions to all of the deletions on the page. This does not satisfy the requirements of the FOIA. It is our understanding, however, that ORP recently corrected this problem by providing HANW with a new set of the redacted documents in which, on pages where multiple exemptions were claimed, a FOIA exemption was claimed for each specific deletion. *See* Electronic Mail Message from Dorothy Riehle, ORP, to Diane DeMoura, OHA (September 9, 2006). Accordingly, we find that this matter has been resolved.

Exemption 4

Exemption 4 exempts from mandatory disclosure “trade secrets and commercial or financial information obtained from a person and privileged or confidential.” 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4); *see also National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). In interpreting this exemption, the federal courts have distinguished between documents that are voluntarily and involuntarily submitted to the government. In order to be exempt from mandatory disclosure under Exemption 4, voluntarily submitted documents containing privileged or confidential commercial or financial information need only be of a type that the submitter would not customarily release to the public. *Critical Mass Energy Project v. NRC*, 975 F.2d 871 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 1579 (1993). Involuntarily submitted documents, however, must meet a stricter standard of confidentiality in order to be exempt. Such documents are considered confidential for purposes of Exemption 4 if disclosure of the information is likely either to impair the government’s ability to obtain necessary information in the future or to cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks*, 498 F.2d at 770; *Critical Mass*, 975 F.2d at 879.

In this case, the information withheld under Exemption 4 appears in the ORP report and the EAC. BNI was required to submit the information in question as part of a contract it held with

DOE. Accordingly, we find that the withheld information was “involuntarily submitted” and, in order for the application of Exemption 4 to be proper, the *National Parks* test must be met.

Under *National Parks*, the first requirement is that the withheld information be “commercial or financial.”¹ The information submitted by BNI, i.e. labor costs and other expenses, procurement information and strategies, estimates, etc., clearly satisfies the definition of commercial or financial information.

The second requirement under the *National Parks* test is that the information be “obtained from a person.” It is well-established that “person” refers to a wide-range of entities, including corporations and partnerships. *See Comstock Int’l, Inc. v. Export-Import Bank*, 464 F. Supp. 804, 806 (D.D.C. 1979); *see also Niagara Mohawk Power Corp.*, 28 DOE ¶ 80,105 (2000). BNI satisfies that definition.

Finally, in order to be exempt from disclosure under Exemption 4, the information must be “privileged” or “confidential.” This case concerns “confidential” information. Withheld information is confidential if its release would either (a) impair the government’s ability to obtain such information in the future or (b) cause substantial harm to the competitive position of submitters. *National Parks*, 498 F.2d at 770. In this case, because the contract for the project required that the information be submitted, it is unlikely that release of the information would impair DOE’s ability to obtain similar information in the future. The question, then, turns to whether release of the information could result in substantial competitive harm to the submitters of the information.

According to ORP, the information “could be used by competitors to the disadvantage of BNI.” Determination Letter. BNI stated that the release of the withheld information could both compromise the procurement process for subcontractors and could be used unfairly by competitors. *See* [BNI’s] Response to FOIA Request Related to April 2005 WTP Estimate at Completion (June 20, 2006). After reviewing the information in question, we conclude that the information is confidential because release of the information could substantially harm BNI’s competitive position. Disclosure of the information could give competitors insight into BNI’s estimating processes, rate development methods, labor pricing, and subcontractor procurement processes. This information could be used by competitors to undercut BNI’s position on any future contract bids and also to impede BNI’s ability to obtain reasonable subcontractor bids.

Exemption 5

Exemption 5 of the FOIA exempts from mandatory disclosure documents that are “inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency.” 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). Exemption 5 permits withholding of responsive material that reflects advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated under the deliberative process privilege. *NLRB v. Sears*,

¹ Federal courts have held that these terms should be given their ordinary meanings and that records are commercial so long as the submitter has a “commercial interest” in them. *Public Citizen Health Research Grp. v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983) (internal citation omitted).

Roebuck & Co., 421 U.S. 132, 149 (1975). In order to be shielded by this privilege, a record must be both predecisional, i.e. generated before the adoption of agency policy, and deliberative, i.e. reflecting the give-and-take of the consultative process. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 856 (D.C. Cir. 1980). This privilege covers records that reflect the personal opinion of the writer rather than final agency policy. *Id.* Consequently, the privilege does not generally protect records containing purely factual matters.

Predecisional materials are not exempt merely because they are prepared prior to a final agency action, policy, or interpretation. These materials must be a part of the agency's deliberative process by which decisions are made. *Vaughn v. Rosen*, 523 F.2d 1136, 1144 (D.C. Cir. 1975). The deliberative process privilege is intended to promote frank and independent discussion among those responsible for making governmental decisions. *EPA v. Mink*, 410 U.S. 73, 87 (1973); *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F. Supp. 939 (Ct. Cl. 1958).

The information withheld under Exemption 5 is contained in both the ORP report and in various items of correspondence from ORP to BNI. It consists primarily of comments, recommendations and opinions prepared by DOE, BNI and Army Corps of Engineers employees regarding the WTP facility. Therefore, the requested information falls within the definition of "inter-agency or intra-agency memoranda" in the FOIA.² In addition, the comments, recommendations, and opinions withheld are clearly predecisional and deliberative. They were generated pursuant to the DOE's review of BNI's submittal of the EAC. The withheld information does not represent a final DOE position, but rather consists of communications among DOE, BNI and the Army Corps of Engineers and recommendations regarding BNI's EAC. Accordingly, we hold that the comments, recommendations, and opinions withheld from the requested documents meet the requirements for withholding material under the deliberative process privilege of Exemption 5.

Discretionary Public Interest Disclosures

The DOE regulations provide that the DOE should release to the public material exempt from mandatory disclosure under the FOIA if the DOE determines that federal law permits disclosure and it is in the public interest. 10 C.F.R. § 1004.1. HANW maintains that disclosure of the withheld information would be in the public interest.

In cases involving material determined to be exempt from mandatory disclosure under Exemption 4, we do not make the usual inquiry into whether release of the material would be in the public interest. Disclosure of confidential information that an agency can withhold pursuant to Exemption 4 would constitute a violation of the Trade Secrets Act, 18 U.S.C. § 1905, and is therefore prohibited. *See, e.g., Chicago Power Group*, 23 DOE ¶ 80,125 at 80,560 (1993). Accordingly, we may not consider whether the public interest warrants discretionary release of the information properly withheld under Exemption 4. *William E. Logan, Jr.*, 27 DOE ¶ 80,198 (1999).

² Although BNI is not a DOE entity or a federal agency, courts have found that many communications between an agency and a non-governmental entity may be considered to be "intra- or inter-agency" documents and may be withheld under Exemption 5. *See, e.g., Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1 (2001); *see also Vladeck, Waldman, Elias & Engelhard, P.C.*, 27 DOE ¶ 80,230 (1999).

Regarding the information withheld under Exemption 5, the withheld information consists primarily of advisory opinions and recommendations provided to or generated by DOE in the consultative process. We find that the release of this would have a chilling effect upon the agency. The ability and willingness of DOE employees to make honest and open recommendations concerning similar matters in the future could well be compromised. If DOE employees were inhibited in providing information and recommendations, the agency would be deprived of the benefit of their open and candid opinions. This would stifle the free exchange of ideas and opinions which is essential to the sound functioning of DOE programs. *See Nevada Nuclear Waste Task Force, Inc.*, 28 DOE ¶ 80,160 (2001). Accordingly, we find that release of the information withheld under Exemption 5 would not be in the public interest.

Segregability

The FOIA also requires that “any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.” 5 U.S.C. § 552(b); see *Greg Long*, 25 DOE ¶ 80,129 (1995). We find that ORP complied with the FOIA by releasing to HANW all factual, non-deliberative portions of the documents.

It Is Therefore Ordered That:

- (1) The Appeal filed on June 12, 2006, by Heart of America Northwest, OHA Case No. TFA-0165, is hereby denied.
- (2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: October 16, 2006